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Citation: 2010 PSLRB 57

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

TREASURY BOARD

Respondent

Indexed as
Public Service Alliance of Canada v. Treasury Board

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Renaud Paquet, Board Member

For the Applicant: Andrew Raven, counsel

For the Respondent: Sean F. Kelly, counsel

Heard at Ottawa, Ontario,
March 15 to 18, 2010.

I. Request before the Board

[1] On March 31, 2009, the Public Service Alliance of Canada ("the applicant" or "the PSAC") filed an application with the Public Service Labour Relations Board ("the Board") under section 43 of the *Public Service Labour Relations Act* ("the *Act*") to review a previous decision of the Public Service Staff Relations Board ("the former Board") in *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 142-02-338 (19990616). That decision amalgamated 15 existing bargaining units into the single Occupational Services group (SV) bargaining unit. The application seeks to redefine that bargaining unit by removing Ship's Crews (SC) employees from it and to consider SCs as a unit appropriate for collective bargaining. The application directly refers to the following provisions of the *Act*:

. . .

> ***43.*** *(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*
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> . . .
>
> ***70.*** *(1) If the Board reviews the structure of one or more bargaining units, it must, in determining whether a group of employees constitutes a unit appropriate for collective bargaining, have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.*
>
> *(2) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.*

. . .

[2] In PSSRB File No. 142-02-338, the former Board fulfilled its obligation to establish the SV bargaining unit as directed by subsection 103(2) of the *Public Service Reform Act*, S.C. 1992, c. 54 ("the *PSRA*"), which reads as follows:

> ***103.*** *(2) Where the certification of a bargaining agent is continued by subsection (1), the Board shall amend the*

> *description, in the certification of the agent, of the employees represented by the agent to accord with the specification and definition of the occupational group under section 101 and, where the agent represents more than one bargaining unit in the occupational group, the Board shall amalgamate those units into one bargaining unit.*

[3] Pursuant to section 101 of the *PSRA,* the Treasury Board ("the respondent" or "the employer") specified and defined the SV occupational group, effective March 18, 1999, as published in the *Canada Gazette*, Part I, Volume 133, No. 13. At page 814, the SV group was defined as follows:

> *The Operational Services group comprises positions that are primarily involved in the fabrication, maintenance, repair, operation and protection of machines, equipment, vehicles, government facilities and structures such as buildings, vessels, stationary and floating plants, stores, laboratories, and equipment; and the provision of food, personal or health support services.*
>
> . . .

[4] In creating the SV group, the employer amalgamated 15 existing occupational groups, including the SCs. In PSSRB File No. 142-02-338, the former Board revoked the 15 existing certificates and replaced them with a new certificate for the SV group. The PSAC was the bargaining agent for those 15 groups, and it became the bargaining agent for the newly created SV group.

[5] The SV bargaining unit is composed of employees working in the following occupations: general labour and trades (GLT), general services (GS), hospital services (HS), heating and power (HP), lighthouse keepers (LI), firefighters (FR), printing (PR) and ship's crews (SC). The SV bargaining unit includes non-supervisory and supervisory unionized employees from all those occupations, except for the non-supervisory PRs, who are not part of the SV occupational group. The non-supervisory PRs are part of a separate bargaining unit.

[6] If this application is granted, the SCs would become a separate bargaining unit, and the SV bargaining unit would be amended accordingly.

II. Summary of the evidence

[7] The applicant submitted abundant material and testimonial evidence mostly about the nature of SC work and working conditions and on the history of collective

bargaining for the SV group and for the SCs. The applicant called Randy Sanderson, Donald Drapeau, David Walsh, Gary Fraser, Michael McNamara and Liam McCarthy as witnesses.

[8] Mr. Sanderson is an SC working for the Canadian Coast Guard (CCG) in British Columbia. He has been an SC since 1985. Mr. Sanderson is a local union officer, and he has been involved in collective bargaining at the national level in every round of bargaining since 2000. Mr. Drapeau is an SC working for the CCG in Quebec. He has been an SC since 1985. Mr. Drapeau is a regional union officer, and he has been involved in collective bargaining at the national level including the last round of bargaining in 2009. Mr. Walsh is an SC working for the CCG in Nova Scotia. He has been an SC since 1981. Mr. Walsh was involved in collective bargaining at the national level during the last round of bargaining in 2009. Mr. Fraser was an SC working for the Department of National Defence (DND) for more than 30 years, and he retired in 2006. Mr. Fraser was a local union officer, and he was involved in collective bargaining at the national level in every round of bargaining between 1985 and 2003. Mr. McNamara and Mr. McCarthy are full-time employees of the PSAC. Mr. McNamara has been a PSAC negotiator since 1990. He negotiated the SV collective agreements from 2000 to 2007. Mr. McCarthy is a senior research officer in the collective bargaining branch of the PSAC. He negotiated the last SV collective agreement.

[9] Most of the written, oral or video evidence adduced by the parties referred to the SCs' specific working conditions or to the past experience of the SCs with collective bargaining. I will summarize it under those two headings.

A. <u>The SCs' specific working conditions</u>

[10] Messrs. Sanderson, Drapeau, Walsh and Fraser described in detail what is unique about the SCs' work and working conditions. Their testimony was supported by video evidence taken aboard vessels and by documents prepared by the CCG. According to the application, there are 1100 SCs. According to one of the witnesses, there are 1900 SCs. According to CCG documents, there are 1385 SCs working in the CCG. Approximately 85 percent of the SCs work for the CCG, the others for the DND.

[11] The SC is a distinct trade in the federal public service, and it is recognized as such by a distinct classification plan. The SCs work on CCG and DND vessels. The SCs at the CCG, along with ships officers (SO), work on missions at sea. The SCs' work on a

vessel is highly diversified, considering that a vessel at sea must be self sufficient. The SCs generally perform their work in the following areas: on deck, the engine room, equipment operation, specialist trades or supply. On the deck, the SCs perform standing watch and participate in steering, stowing cargo, chipping and painting, rigging and winching, handling pollution gear and equipment, cleaning up spills, and streaming and retrieving scientific equipment. The SCs in the engine room assist engineers in lubricating moving parts, dismantling and reassembling machinery, and cleaning and painting. The SCs in equipment operation operate and service machinery on board ship. The SCs in specialist trades are machinists, carpenters or electricians, etc. The SCs in supply perform work related to storing supplies, maintaining records, preparing and serving food, providing other personal services, and managing and identifying material on board ship. For the SCs working in the CCG, most of that work is performed at sea, sometimes hundreds or thousands of kilometres from shore.

[12] The SCs participate in search and rescue operations at sea involving searching for and assisting people, ships or other craft that are, or believed to be, in imminent danger. The SCs participate in clean-up operations of all ship-sourced and mystery spills into the marine environment in waters under Canadian jurisdiction. The SCs participate in CCG aids to navigation by providing mariners with safe, accessible and effective vessel transits in Canadian waters. The SCs also work on CCG ice breaking operations. They also provide support services to government research and scientific missions at sea.

[13] On average on any given day, the SCs contribute to the CCG saving 8 lives and assisting 55 people in 19 search and rescue cases, dealing with 3 reported pollution events, supporting 3 hydrographic and 8 scientific missions, managing 2325 commercial ship movements, servicing 60 aids to navigation, handling 1547 marine radio contacts, surveying 5 kilometres of navigation channel bottom, escorting 4 commercial ships through ice, and carrying out 12 fisheries patrols.

[14] To illustrate the staff complement of a vessel, Mr. Sanderson provided as an example a large offshore research vessel. That vessel is staffed by 40 employees, 24 of them SCs and the others SOs. The vessel is at sea for 28 days at a time. Every 28 days, staff is rotated. The SCs and the SOs work for 28 days and then are off on lay days for 28 days. That means that 20 employees are on the vessel at a time. While at sea, the SCs work 12 hours a day, 7 days a week. The SCs are captive on the vessel even during

their 12 hours of rest. During those 28 days at sea, they earn lay days that they spend during the 28 days that they are not at sea. Some SCs work a different schedule, but most work under the lay day system.

[15] While at sea, it is sometime impossible for the SCs to benefit from some of the provisions of the collective agreement. For example, an SC on a mission far at sea cannot ask for one day off to take care of a sick family member or to attend a funeral. Often, the SCs are absent when important positive or negative family events occur. Further, if an SC is sick while at sea, others have to take up the work. Under those conditions, people tend to work when sick.

[16] Working and living conditions on a vessel can be very difficult, mostly because of bad weather. If an employee is not careful, he or she may be killed. Health and safety is the number one issue. Problems with drinking water and air conditions can arise. Vessels can conduct operations in some of the world's most remote locations under extreme environmental conditions. The SCs on a vessel cannot exercise the right to refuse dangerous work because they do not have such that right as do other SVs under the *Canada Labour Code*. They must obey the vessel's captain.

[17] According to the witnesses, the morale of the SCs is very low. They feel that they are underpaid. The working conditions are difficult, but nobody seems to care. The SCs sometimes feel let down and not supported by their superiors. On that point, Mr. Walsh testified about the events of the capsizing and sinking of the Acadien II off the coast of Cape Breton on March 28 and 29, 2008.

B. <u>Past experience of the SCs with collective bargaining</u>

[18] The applicant was certified as the bargaining agent for the SC bargaining unit in 1968. For more than 30 years, the applicant negotiated separate collective agreements for the SC bargaining unit. In 1999, the applicant was certified to represent the newly created SV bargaining unit. That certification followed the employer's decision to amalgamate 15 occupational groups, including the SCs, into a single group, namely the SV group. However, before the creation of the SV group, the applicant and the respondent had agreed to jointly bargain for most of those 15 groups, including the SCs, even though the 15 groups were still 15 separate bargaining units.

[19] Since the creation of the SV bargaining unit in 1999, the applicant and the respondent have negotiated four collective agreements. The applicant's witnesses called those rounds of bargaining "the 2000 round," "the 2001-2003 round," "the 2003-2007 round" and "the 2007-2011 round."

[20] In 2000, the parties decided to extend by one year the old collective agreement with a salary increase for that year. That decision was made because a new universal classification standard (UCS) was to be introduced shortly. It could have had an important impact on the wage structure in the federal public service, and the parties felt that it was appropriate to await the details of the new standard before tying themselves to longer-term pay rates. There was some hope amongst the SCs that the new standard could help them obtain a substantial pay increase. According to the witnesses, the SCs were not able to resolve their issues with the lay day system during that round of bargaining.

[21] Early during the 2001-2003 round, it became clear that the UCS would not be implemented, and that the SCs' pay concern would therefore not be addressed through changes to the public service classification system. However, the conciliation board recommended that a pay study be conducted for every occupation within the SV bargaining unit, including the SCs. The lay day issues were not addressed in that round, and there was no support from the non-SC members to seriously pursue those issues. The SCs felt extremely frustrated at the end of the process.

[22] The results of the pay study recommended in the previous round came out shortly after the 2003-2007 round started. The response rate for the employers used for the SC pay comparison was very low, and the sample was not representative of the SCs' outside labour market. As a result, the study recommended little pay increase for the SCs. For the other occupations within the SV bargaining unit, the study recommended substantial pay increases. The employer agreed to increase the pay rates by 40 percent of what the study recommended. Improvements to the lay day system were requested for the SCs, but were not addressed by the employer's final offer. Because of the substantial pay increase being offered for the non-SC members of the SV bargaining unit, the final offer was accepted by a majority of the SVs.

[23] For the 2007-2011 round, the parties agreed to set up a subcommittee of the bargaining team to address specific SC issues. The subcommittee did not have the power to amend the collective agreement but rather was only entitled to submit

changes to which the subcommittee had agreed to the full bargaining team. At first, the SCs were happy about the subcommittee because they felt that the employer's side would understand them. However, nothing came out of the subcommittee because the union bargaining team had to accept the employer's final offer under the threat of special legislation suspending collective bargaining. No changes were made to the SCs' working conditions. The final offer contained national rates of pay for the majority of the SV bargaining unit, which had been a priority for years for most SVs. However, the SCs gained nothing from that final offer because they had been paid at national rates of pay since the 1980s. A majority of SVs accepted the offer.

[24] The witnesses testified that the SCs would choose the arbitration route if they could not reach a collective agreement with the employer. Almost all SCs are designated as essential, and they cannot exercise their right to strike. That is not the case for the other SVs, who prefer to choose conciliation with the right to strike. The SCs would also prefer arbitration because they witnessed what their SO work colleagues obtained that way. In 2000, the SCs' wages were 86.9 percent of the SOs' wages, and in 2010, the SCs were paid 77.1 percent of the SOs' wages. The dollar difference was $5617 in 2000 and $14 034 in 2010. In addition, for comparable classification points under a common scale, the SCs are underpaid when compared to the SOs.

[25] Mr. Sanderson and Mr. McNamara explained how the PSAC prepares its bargaining proposals. The process starts with the PSAC calling on its components and its locals, asking for bargaining proposals. Those proposals are discussed at regional conferences by local and regional delegates. After the regional conferences, the proposals are reviewed by the delegates at a national conference. The national conference decides which proposals will be submitted to the employer. It also elects the members of the bargaining team that will negotiate with the employer. The bargaining team also includes a professional negotiator and a researcher appointed by the PSAC. The bargaining team works by consensus, and the negotiator organizes the discussions. Since the creation of the SV bargaining unit, an SC member has always been elected to the SV bargaining team.

[26] The collective agreements negotiated by the parties between 1999 and 2010 were adduced in evidence. The PSAC's bargaining proposals and some submissions to a conciliation board were also adduced in evidence. At each round of bargaining, the

PSAC presented specific proposals to improve the SCs' working conditions. Some of those proposals or submissions were directly related to improving the lay day system. In the course of the four rounds of bargaining (2000 to 2011), those proposals resulted in some changes to the SV collective agreement. Of those changes, more than 20 were made to "Appendix G," which includes specific provisions for the SCs. In the 2007-2011 collective agreement, that appendix was 50 pages long. The applicant characterized those changes as minor. For the respondent, they represent substantial improvements to the SCs' working conditions.

[27] According to the witnesses, all SCs want to have a separate bargaining unit. Seafaring is a unique profession with unique work and needs. The SCs feel that they made significant gains when they negotiated alone, but they have been left on the sidelines since they became part of the SV bargaining unit. The other members of the bargaining unit provide very little support for the SCs' specific issues, such as pay rates and lay day issues.

[28] The applicant adduced in evidence a resolution adopted at its 2006 triennial convention supporting a separate bargaining unit for the SCs. The rationale for the resolution is that the SCs feel discriminated against vis-à-vis the SOs, who have their own bargaining unit, and that they feel alienated from the SV bargaining unit since they have nothing in common with them.

III. Summary of the arguments

A. For the applicant

[29] The applicant is asking for an order from the Board to redefine the SV bargaining unit and to create a separate bargaining unit for the SCs. The actual bargaining unit structure does not permit satisfactory representation of the SCs. The PSAC is making this application on behalf of the SCs, and no other bargaining agent is involved. The PSAC is the bargaining agent for the SV bargaining unit, and it will continue to be the bargaining agent for the redefined SV bargaining unit and for the newly created SC bargaining unit.

[30] This case is different from the Board's past decisions because, in contrast, this application does not imply a change of bargaining agent, was not made because of the creation of a new employer and did not originate with an employer. In this case, the application originated with a bargaining agent, which seeks to amend the bargaining

structure for its own members. The Board should presume that the bargaining agent knows the best interests of the employees that it represents. For the SCs, it is their own bargaining unit. On that point, the PSAC, at its 2006 triennial national convention, adopted a resolution for the SCs to have their own bargaining unit.

[31] The testimonial evidence adduced by the applicant has not been contradicted by the respondent. That evidence shows that the SCs have not been able to make substantial gains at the bargaining table since they have been part of the SV bargaining unit. Their priorities were overwhelmed by those of other employees, who form the majority of the bargaining unit.

[32] The SCs were certified as a bargaining unit in 1968. For more than 30 years, they negotiated their own separate collective agreements. That changed in 1999, when the former Board decided to amalgamate them with 15 other former bargaining units following the creation of the Operations Services group by the employer. At that time, the former Board did not analyze the situation and did not discuss the appropriateness of its decision and its labour relations implications.

[33] There is no community of interest between the SCs and the other employees in the SV bargaining unit. The SCs work on vessels at sea, but no other SVs do. Contrary to the other employees in the SV bargaining unit, the majority of SCs work a schedule of 28 consecutive days at sea, away from home. That implies that their working conditions are unique within the SV bargaining unit. That also implies that their demands at the bargaining table are unique.

[34] Since their amalgamation into the SV bargaining unit in 1999, the SCs have not been able to properly address their unique issues at the bargaining table. In fact, they have not made any substantial gains since 1989-1990. For most of the 1990s, there was no collective bargaining. After 1999, they were amalgamated with the SV bargaining unit; they represent only a small fraction of the employees in that unit. It became very difficult for them to have their issues considered. At every round of bargaining, the majority of employees in the SV group were primarily interested in obtaining national rates of pay. The SCs' priorities were set aside to obtain national rates of pay for the majority, which was achieved during the last round of bargaining.

[35] Abundant evidence was adduced supporting the uniqueness of the SCs' work. The only other group of employees to whom they might be compared is the SO

bargaining unit. That unit has never been amalgamated with another unit, and it bargains its own collective agreement.

[36] The wishes of employees are important criteria in a decision of the Board to create a separate bargaining unit. The witnesses in their testimonies have clearly expressed that the SCs want their own bargaining unit. The evidence showed that the SOs' salaries increased more than the SCs over the past 10 years. In 2000, the wage gap was $5617 in favour of the SOs, and in 2010, that gap is $14 034. Furthermore, the job evaluation relationship between both groups shows that, for equivalent common classification points, the SCs have hourly rates that are consistently lower than the SOs.

[37] Both the applicant and the respondent recognized the uniqueness of the SCs in agreeing to put in place a subcommittee of the bargaining team to deal with the SCs' specific issues and bargaining proposals. However, nothing came out of that subcommittee, and no changes were made to the SCs' specific working conditions as a result of the subcommittee's work.

[38] The SV bargaining unit has chosen the conciliation route with the right to strike for resolving disputes arising during collective bargaining. Most non-SC employees of the SV bargaining unit are not designated as essential to the safety and security of the public. To the contrary, nearly all SCs are designated as essential, and none of them may exercise their right to strike. If the SCs had their own bargaining unit, they could choose arbitration for resolving disputes arising during collective bargaining. Being part of the larger SV bargaining unit prevents them from exercising that right.

[39] The SCs have unique working conditions. They perform dangerous work on vessels, but unlike other groups, they do not benefit from some of the health and safety protections contained in the *Canada Labour Code*. They are the only part of the SV bargaining unit that are captive on a vessel for 28 days under the lay day system. While at sea, some provisions of their collective agreement cannot be used. They are underpaid when compared to the SOs and to other trades within the SV bargaining unit.

[40] If the application is granted by the Board, the SV bargaining unit will continue to exist without the SCs. It will continue to be a viable unit. The SCs will also be a viable unit, as they were for more than 30 years.

[41] The SCs have a distinct classification plan, their own classification standard and their own rates of pay, which support the argument that they have a community of interest distinct from that of the SV bargaining unit. There is no SV classification plan or SV classification standard and no SV rates of pay.

[42] In support of its arguments, the applicant referred me to the following decisions: *Association of Marine Assessors, Inspectors and Investigators of the Public Service of Canada v. Treasury Board*, PSSRB File No. 142-02-321 (19980608); *Canada Post Corporation v. Canadian Union of Postal Workers* (1988), 73 di 66; *Canadian Museum of Civilization v. Public Service Alliance of Canada et al.* (1992), 87 di 185; *Canadian Union of Operating Engineers v. Canada (Treasury Board) (Heating, Power and Stationary Plant Operations Group - Operational Category)*, PSSRB File Nos. 146-02-138 and 140 to 142 (19701211); *Council of Graphic Arts Unions of the Public Service of Canada et al. v. Canada Communication Group*, PSSRB File Nos. 142-28-302 to 310 and 161-28-702 and 705 (19940329); *House of Commons v. Professional Institute of the Public Service of Canada et al.*, 2009 PSLRB 23; *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2000 PSSRB 52; *National Energy Board v. Public Service Alliance of Canada and Professional Institute of the Public Service of Canada*, 2003 PSSRB 79; *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 142-02-274 (19880108); *Public Service Alliance of Canada et al. v. National Energy Board*, PSSRB File Nos. 142-26-297 to 301 (19931108); and *Public Service Alliance of Canada v. Canada (Treasury Board)*, 2005 FC 1297.

B. <u>For the respondent</u>

[43] The respondent argued that the applicant has the onus to prove with sufficiently clear, convincing and cogent evidence that the SV bargaining unit should be fragmented. The applicant has not met its burden of proving that a significant change has rendered the existing SV bargaining unit structure unsatisfactory and that that structure prevents the satisfactory representation of the SCs. Consequently, the application should be dismissed.

[44] The applicant adduced no evidence to support that, since the creation of the SV bargaining unit in 1999, significant changes have occurred in the work organization, working conditions or any other organizational matters that could affect the SCs and justify fragmenting the existing bargaining unit. In its previous decisions, the Board

has established that such changes are required before it would consider a bargaining unit review application.

[45] The SCs are not part of a distinct occupational group or subgroup. For the Board to divert from the statutory obligation to establish bargaining units that are coextensive with the occupational groups, it must conclude that the current SV bargaining unit prevents the satisfactory representation of the SCs. In its process, the Board should consider factors such as its aversion to fragmenting bargaining units, the conduct of the applicant, the history of collective bargaining, the impact of any compensation restraint legislation and the community of interest.

[46] As did the former Board, the Board has always avoided fragmenting bargaining units because sound labour relations requires broad-based bargaining units. The fewer the bargaining units, the less likely the potential for impasses in negotiations, work disruptions and jurisdictional disputes. The SCs might have some specific interests, but that is not unique. It is inherent to the collective bargaining process that bargaining agents must address and reconcile divergent interests.

[47] The respondent submitted that the applicant has effectively represented the SCs to date. There is no evidence of any failure or reluctance on the part of the applicant to address the concerns of the SCs. To the contrary, the applicant has canvassed the SCs to determine their objectives and concerns at each round of bargaining. Those concerns were discussed at bargaining conferences, and they were submitted to the employer in every round of bargaining. They were also included in conciliation briefs. The applicant has always included the SCs in the SV bargaining team. In addition, during the last round of bargaining, the applicant and the respondent agreed to have an SC subcommittee of the bargaining team to deal with SC-specific issues.

[48] The respondent submitted that the history of collective bargaining demonstrates satisfactory representation. In the 1997-1999 round, before the establishment of the SV bargaining unit, the applicant collectively bargained the SCs' specific issues with other bargaining units. In April 1999, a global ratification vote was conducted for all 15 bargaining units, including the SCs, despite the fact that the former Board did not amalgamate the SV bargaining unit until June 1999. Since the creation of the SV bargaining unit, the SCs have obtained significant gains at the bargaining table. Furthermore, the alleged hurdle to the SCs' bargaining interest no

longer exists since the majority of the SVs were looking for national rates of pay and obtained them in the last round of bargaining.

[49] The respondent submitted that compensation restraint legislation such as the *Expenditure Restraint Act* has affected collective bargaining. That type of legislation makes it difficult to draw any definitive conclusion about the efficiency of the current bargaining structure over the restraint period.

[50] The respondent submitted that the SCs share a community of interest with all the other employees in the SV bargaining unit. The SCs, like other non-SC employees in the unit, are asked to perform some carpentry and electrical work, some unskilled labour work, some maintaining and repairing of certain machinery or equipment, some building of facilities and structures, some housekeeping and janitorial services, some preparing and serving of meals, some operating of machinery, some storekeeping duties, and some firefighting work.

[51] The respondent submitted that the wishes of the SCs are not determinative in the decision to fragment the bargaining unit. The opinion evidence adduced by the witnesses at the hearing is not proof that the current bargaining unit structure does not permit satisfactory representation of the SCs.

[52] The respondent submitted that the Board should dismiss the application. In support of its arguments, the respondent referred me to the following decisions: *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 142-02-338 (19990616); *Association of Marine Assessors, Inspectors and Investigators of the Public Service of Canada; F.H. v. McDougall*, 2008 SCC 53; *Canada (Canadian Forces, Staff of the Non-Public Funds) v. United Food and Commercial Workers Union, Local 864*, PSSRB File No. 125-18-78 (19981104); *National Energy Board*; *House of Commons*; *Parks Canada Agency v. Professional Institute of the Public Service of Canada et al.*, 2000 PSSRB 109; *Association of Justice Counsel et al. v. Treasury Board et al.*, 2006 PSLRB 45; *Canada Customs and Revenue Agency v. Professional Institute of the Public Service of Canada and Public Service Alliance of Canada*, 2001 PSSRB 127; *International Brotherhood of Electrical Workers, Local 2228*; *Communications Security Establishment, Department of National Defence v. Public Service Alliance of Canada and Professional Institute of the Public Service of Canada*, 2001 PSSRB 14.

IV. Reasons

[53] The applicant is asking the Board to review the structure of the SV bargaining unit by removing the SCs from that unit and by creating a new bargaining unit for them. Pursuant to section 70 and 71 of the *Act*, the Board, in reviewing bargaining unit structures, must have regard to the employer's classification of persons and positions, including the occupational groups and subgroups. The Board must establish units that are coextensive with those groups and subgroups, unless doing so would not permit satisfactory representation of the employees and, for that reason, would not be appropriate for collective bargaining.

[54] Even though the SCs have their own classification standards, they are not an occupational group. They are included in the SV occupational group. The SV group has no subgroups. Because the SCs are not an occupational group or subgroup, they cannot be a bargaining unit unless the Board concludes that the SV bargaining unit structure does not permit satisfactory representation and appropriate collective bargaining for them. The applicant has the burden of proving so.

[55] The applicant adduced abundant evidence to prove that the SCs have unique working conditions. They are the only group of employees within the SV bargaining unit whose work keeps them away from home at sea for weeks at a time. Those working arrangements imply unique work rules and conditions, including the lay day system. Even though a large part of the SCs' tasks are comparable to those of the GLTs, GSs or FRs, the conditions under which those tasks are performed are very different.

[56] The applicant also adduced evidence that the SCs could be a viable bargaining unit in which there would be a strong community of interest. According to the applicant, that community of interest would be a lot greater than it is presently within the SV bargaining unit.

[57] I agree with the applicant on those points. The SCs are unique, their working conditions are different and they could be a viable unified bargaining unit. However, those are not the criteria on which I must rely to decide this case. According to the *Act*, I must examine whether the actual bargaining unit structure does not permit satisfactory representation, not whether the proposed one would permit it.

[58] The parties submitted abundant jurisprudence in support of their respective arguments. However, in none of those decisions did the former Board or the Board

agree to fragment a bargaining unit or to create one that was not coextensive with the occupational groups or subgroups. Were this application granted, it would be the first time for either the former Board or this Board.

[59] In *Association of Marine Assessors*, the former Board rejected an application to fragment the Technical Inspection bargaining unit. The former Board reaffirmed its reluctance to fragment an existing bargaining unit. It was also of the opinion that the existing bargaining agent had not failed in making efforts to represent the marine assessors. In *Canadian Union of Operating Engineers*, the former Board rejected an application to create a new bargaining unit to represent employees in four Ontario workplaces already covered by a national bargaining unit. In *International Brotherhood of Electrical Workers, Local 2228,* the former Board rejected an application to change a group of employees from one bargaining unit to another. The former Board concluded that the existing bargaining unit group definition was a better fit for those employees than the definition of the proposed bargaining unit.

[60] In *Professional Institute of the Public Service of Canada*, a case dealing with the Patent Examination subgroup, the former Board accepted an application to fragment an existing bargaining unit and to create a separate bargaining unit for one of the existing occupational subgroups defined by the employer. That case differs from this case because the SCs are not a subgroup of the SV group, as Patent Examination was a subgroup of the Scientific Regulation group.

[61] The other cases submitted involved employer applications to merge bargaining units or applications involving newly created organizations. In *Canada Post Corporation*, the Canada Labour Relations Board (CLRB) decided to reduce from 26 to 4 the number of bargaining units after the creation of the Canada Post Corporation. In *Canadian Museum of Civilization*, the CLRB had to establish the bargaining unit structure after the Canadian Museum of Civilization became a Crown corporation. The CLRB decided that there would be 2 bargaining units for the employees who belonged to 21 former bargaining units. In *Council of Graphic Arts Unions of the Public Service of Canada*, the former Board had to establish the bargaining unit structure of the Canada Communication Group when it became a separate employer. The former Board rejected the employer's proposal for a single bargaining unit for all employees and decided instead to create two bargaining units. In *House of Commons*, the Board rejected an application from the employer to merge all existing bargaining units into a single

bargaining unit. In *National Energy Board*, the former Board accepted the employer's proposal to merge two existing bargaining units into one.

[62] Based on the decisions in *House of Commons* and *National Energy Board*, the respondent argued that there had to be a significant change that rendered an existing bargaining structure unsatisfactory for the Board to review it. In those decisions, the Board referred to changes within the organizations that made the existing bargaining unit structure inappropriate. In both cases, the applicant was the employer, which sought a merger of existing bargaining units. In that context, the presence or absence of significant organizational change became an important factor in justifying the Board's decisions. The Board wanted some stability in bargaining unit structure. After making a decision to create a particular unit, the Board would agree to modify that unit only if the basic situation that it had initially analyzed had changed. In this case, the applicant is the bargaining agent, and it seeks the fragmentation of a unit. The former Board performed no analysis before creating the SV bargaining unit. The former Board was directed by subsection 103(2) of the *PSRA* to create that unit.

[63] In the context of this case, the applicant does not have to prove that there have been substantial changes since the creation of the SV bargaining unit but rather that the SV bargaining unit has not permitted, since its creation in 1999, the satisfactory representation of the SCs and is therefore not appropriate for collective bargaining.

[64] The question here is to decide whether the SV bargaining unit structure permits satisfactory representation of the SCs and not whether the SV bargaining unit structure has met the expectations of the SCs in its relatively short history.

[65] The evidence from the three SC witnesses and from the two PSAC negotiators is that the SCs have not achieved what they should have in the last four rounds of bargaining because of the SV bargaining unit structure. They were not able to achieve significant gains in wages and benefits related to the lay day system. According to them, one of the reasons was that there was little support within the PSAC's bargaining team for the SC's specific issues.

[66] I have carefully reviewed the changes made to the lay day provisions of the collective agreement in the last four rounds of bargaining. Most seem relatively minor. On wages, the SOs got a far better deal in the last four rounds of bargaining than the SCs. The GLTs and the GSs, who are the two largest groups in the SV bargaining unit,

also got a far better deal than the SCs. They received a higher wage adjustment in the 2003-2007 round, and they obtained national rates of pay in the 2007-2011 round.

[67] Those facts alone are sufficient to explain why the witnesses believe that the SV bargaining unit structure did not meet the SCs' expectations. However, they do not prove that the SV bargaining unit structure does not permit the satisfactory representation of the SCs. In fact, since 2000, the SCs have been properly represented by the applicant, which submitted on their behalf a large number of bargaining proposals that would have substantially improved their wages and their specific working conditions had the employer accepted them.

[68] Four rounds of bargaining is a short period over which to conclude that a bargaining unit does not permit the satisfactory representation of a group of employees, especially when two of those rounds cannot be considered as "normal" rounds. In the 2000 round, the parties negotiated a one-year agreement and extended most of the working conditions in light of the anticipated implementation of the universal classification system. In the 2007-2011 round, the negotiations were pushed to an abrupt end with the threat of upcoming legislation that would cap wage increases. During that round, the SCs started discussing their own issues at a subcommittee, but those discussions ended with the tentative agreement and the upcoming legislation.

[69] I believe the applicant that the SCs are not satisfied with what they have achieved in the last four rounds at the bargaining table. That does not prove that the SV bargaining unit structure is inadequate. The bargaining unit structure is only one of the factors, which contributes to the satisfactory representation of employees and, ultimately, to appropriate or satisfactory results in collective bargaining.

[70] For a group of employees like the SCs, the bargaining unit structure must allow them to prepare satisfactory bargaining proposals and to be able to present those proposals to the employer. The evidence shows that the SCs can do that within the SV bargaining unit. Those proposals might not have been top priorities for the other members of the SV bargaining team, but that does not mean that the actual bargaining structure prevents the SCs from achieving their legitimate goals. On that point, the applicant might be able to exercise some influence over its SV bargaining team, especially now that the issue of national rates of pay for the majority of the unit has been resolved.

[71] Another very important factor to satisfactory results in collective bargaining is the employer's willingness to address the problems raised by the bargaining agent and to substantially increase lagging wages. In a public service environment, where the employer and the legislator are two arms of the same body, it is even more important. For half of the last 20 years, special legislation has put a cap on allowable maximum wage increases. No bargaining unit structure can change that reality of public sector labour relations.

[72] Satisfactory results in collective bargaining can also be influenced by other factors not related to the bargaining unit structure, such as the demographic, economic and political contexts. For example, with an aging workforce, the employer could experience recruiting and retention problems if working conditions and wages are not competitive. The same could happen under labour market conditions favourable to employees. Political decisions, such as a much stronger presence in the Arctic, could also increase the demand for the SCs and put pressure on improving working conditions.

[73] The applicant did not convince me on a balance of probabilities that the actual SV bargaining unit structure does not permit the satisfactory representation of the SCs. However, it convinced me that the SCs' working conditions are unique. After looking at the evidence, I am also inclined to believe that the SCs have not received their fair share of improvements in wages in the last 10 years when compared to the SOs, with whom they work on a daily basis, and with most of their SV colleagues, with whom they share the same collective agreement.

[74] In all fairness to the SCs, I believe that the parties, especially the respondent, should seriously examine that situation and make genuine efforts to fix it within the confines of the actual bargaining unit structure.

[75] First, the SV collective agreement will expire on August 4, 2011, and the parties could commence formal negotiations in less than one year. The parties could again try to discuss specific SC issues in a subcommittee as they started to do in the last round of bargaining. Nothing prevents the parties from beginning now to discuss the mandate and the *modus operandi* of the subcommittee so that it is ready to begin its work shortly after notice to bargain is served.

[76] Second, pursuant to sections 9 and 10 of the *Act*, the parties could engage in the codevelopment of workplace improvements related to specific SC scheduling and work organization issues. Sections 9 and 10 read as follows:

> ***9.*** *For the purpose of this Division, "co-development of workplace improvements" means the consultation between the parties on workplace issues and their participation in the identification of workplace problems and the development and analysis of solutions to those problems with a view to adopting mutually agreed to solutions.*
>
> ***10.*** *The employer and a bargaining agent, or a deputy head and a bargaining agent, may engage in co-development of workplace improvements.*

[77] Third, the parties could jointly undertake a pay study of the SCs to get a better picture of their pay situation than the one they obtained early in the 2003-2007 round of bargaining. This could be done, with or without the assistance of the Board's compensation and analysis research services before the next round of bargaining. The results of that study could be used to help bargain the SCs' wages in 2011.

[78] Fourth, pursuant to section 110 of the *Act*, the parties and the deputy heads of the CCG and the DND could jointly engage in a two-tier bargaining process for the SCs. Under that process, they could decide to jointly bargain any SC terms and conditions of employment, even if the SCs are part of the larger SV bargaining unit. Section 110 reads as follow:

> ***110.*** *(1) Subject to the other provisions of this Part, the employer, the bargaining agent for a bargaining unit and the deputy head for a particular department named in Schedule I to the* Financial Administration Act *or for another portion of the federal public administration named in Schedule IV to that Act may jointly elect to engage in collective bargaining respecting any terms and conditions of employment in respect of any employees in the bargaining unit who are employed in that department or other portion of the federal public administration.*
>
> *(2) Collective bargaining under subsection (1) may relate to more than one department or other portion of the federal public administration if each of the deputy heads concerned elects to engage in the collective bargaining.*
>
> *(3) The parties who elect to bargain collectively under subsection (1) must, without delay after the election,*

> *(a) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> *(b) make every reasonable effort to reach agreement on the terms and conditions of employment in question.*

[79] Fifth, pursuant to section 182 of the *Act*, the parties could agree to refer to an alternate dispute resolution process any SC terms and conditions of employment, including wages. Even if the SV bargaining unit continues to choose the conciliation route to resolve bargaining disputes, the parties to the SV collective agreement could refer some SC working conditions, including wages, to a final and binding determination process similar to binding arbitration. Subsections 182(1) and (2) are of particular interest. They read as follows:

> ***182.*** *(1) Despite any other provision of this Part, the employer and a bargaining agent for a bargaining unit may, at any time in the negotiation of a collective agreement, agree to refer any term or condition of employment of employees in the bargaining unit that may be included in a collective agreement to any eligible person for final and binding determination by whatever process the employer and the bargaining agent agree to.*
>
> *(2) If a term or condition is referred to a person for final and binding determination, the process for resolution of a dispute concerning any other term or condition continues to be conciliation.*

[80] Those five suggestions are not an exhaustive list of all the options that exist within the actual bargaining unit structure to address specific SC issues. However, they could certainly help address them. Their very existence supports my conclusion that the actual bargaining unit structure could possibly permit satisfactory representation of the SCs.

[81] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[82] The application is dismissed.

April 26, 2010.

Renaud Paquet,
Board Member